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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1515

FARRELL LINES INCORPORATED,
Petitioner,

against

WILLIAM RIVERA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF FARRELL LINES INCORPORATED

ROBERT A. LILLY
Counsel for the Petitioner
17 Battery Place
New York, New York 10004

ROBERT A. LILLY
and
STEVEN L. BARKAN
On the Petition

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	6
APPENDIX:	
Opinion of United States Court of Appeals	7
Decision of United States District Judge, Harold R. Tyler	15
Judgment of the United States District Court	16

TABLE OF AUTHORITIES

Cases:

Atlantic and Gulf Stevedore, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780	6
Dennis v. Denver Rio Grande Western Railroad Co., 375 U.S. 208, 11 L.Ed. 2d 256, 84 S. Ct. 291	4
Fleming v. American Export Isbrandtsen Lines, Inc., 451 F. 2d 1329 (2nd Cir. 1971)	4, 5

PAGE

Lavender v. Kurn, 327 U.S. 645, 90 L.Ed. 916, 66 S. Ct. 740 4

McBride v. Loffund Brothers Co., 422 F.2d 363 (5th Cir. 1970) 4

Other Authority:

Constitution of the United States, Amendment VII .. 2

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against

WILLIAM RIVERA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF FARRELL LINES INCORPORATED

Petitioner, Farrell Lines Incorporated, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on February 15, 1973, reversing the judgment of the United States District Court for the Southern District of New York.

Opinions Below

The judgment of the United States District Court, Southern District of New York, was entered on January 13, 1972 and the memorandum decision of United States District Judge, Harold R. Tyler, which was duly made on January 11, 1972 denying respondent's motion for a new trial,

are printed in the appendix hereto, *infra* pages 15 and 16, respectively. The opinion of the United States Circuit Court of Appeals is printed in the appendix hereto, *infra* pages 7-14.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 15, 1973. This petition for certiorari has been served and filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

1. Did the United States Court of Appeals for the Second Circuit effectively deny petitioner its right to a trial by jury?

2. Did the United States Court of Appeals for the Second Circuit, by reversing the jury's determination and the decision of the trial judge, substitute its findings of facts for that of the jury?

Constitutional Provision Involved

The Constitution of the United States, Amendment VII provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Statement of the Case

The respondent in this case was a merchant seaman employed by the petitioner as a messman aboard the respondent's vessel, SS AFRICAN SUN. During the course of his employment aboard said vessel, respondent sustained personal injuries when he slipped and fell. He claims that his accident occurred due to the presence of water on the deck's surface of the ship's pantry. He alleged that water backed out of the drains in the deck causing the area to become slippery.

At the end of the trial, counsel for the respondent moved for a directed verdict on the issue of contributory negligence, arguing that this defense should be dismissed because of a failure of proof. That motion was denied.

The Trial Judge charged the jury and directed them to return a general verdict. He submitted the following four interrogatories for the jury to answer:

> "1. Was there an unseaworthy condition in the crew pantry on the date of the alleged accident?
>
> 2. Was the defendant negligent?
>
> 3. If your answer to one or two above, or both, is yes, did such unseaworthy condition and/or negligence play a part in bringing about the injury of which plaintiff here complains?
>
> 4. Was plaintiff guilty of contributory negligence at the time in question?"

A general verdict was returned in favor of the plaintiff in the amount of $15,000. All of the interrogatories were answered by the jury in the affirmative.

Respondent's counsel was permitted to, and did, make post-trial motions relating to the verdict as provided for by the Federal Rules of Civil Procedures. After hearing

arguments on the motions, the Trial Judge filed a memorandum decision denying the plaintiff's motion for new trial.

The $15,000 judgment rendered by the District Court in respondent's favor was reversed by the Circuit Court of Appeals. It being that Court's view that there was not enough evidence of contributory negligence in the record to create a question for the jury.

Reasons for Granting the Writ

1. The evidentiary requirements, upon which the jury was to base its decision, were set forth by the trial court in its charge. It has been previously held that where there is an evidentiary basis for a jury's verdict, a jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *Dennis* v. *Denver Rio Grande Western Railroad Co.*, 375 U.S. 208, 11 L.Ed. 2d 256, 84 S.Ct. 291; *Lavender* v. *Kurn*, 327 US 645, 90 L.Ed. 916, 66 S.Ct. 740. An Appellate Court must not reverse the conclusion of the jury except in the instance where there is a complete absence of probative facts to support the conclusion reached by the jury. It is only when there is that complete absence of fact, that reversible error appears. *Lavender* v. *Kurn, supra; Dennis* v. *Denver Rio Grande Western Railroad Co., supra; Fleming* v. *American Export Isbrandtsen Lines, Inc.*, 451 F.2d 1329 (2nd Cir. 1971).

The same standards of evidence apply to the defendant in proving the affirmative defense of contributory negligence, as apply to the plaintiff in proving his case. *Fleming* v. *American Export Isbrandtsen Lines, Inc., supra*; *McBride* v. *Loffund Brothers Co.*, 422 F.2d 363 (5th Cir. 1970).

The Second Circuit, in reviewing the trial transcript, did not find that there was a complete absence of evidence tending to prove that respondent was contributorily negligent,

but determined that there was not enough evidence of contributory negligence to create a jury question. In so doing, it reviewed theories of contributory negligence and considered that the evidence in the record, which tended to show negligence on the part of the respondent, was at best incomplete. The jury, after reviewing the same evidence, and the Trial Judge, considered that there was sufficient evidence on which to base a finding that respondent was contributorily negligent. As Judge Tyler stated in his memorandum denying plaintiff's motion for a new trial:

> "* * * It was not until about 1720 hours that plaintiff testified that he slipped and fell in the pantry. In the interim, he made no effort to report the condition or mop it up. More important, the record fairly indicates that plaintiff could have gone to the galley to pick up the order of ice cream rather than proceed into the pantry which, according to him, he knew to be in a dangerous condition. On this record, the jury was entitled to find contributory negligence."

The Circuit Court did not find that there was a complete absence of evidence. Consequently, the reversal was improper. It deprived petitioner of its right to a jury trial.

2. The Second Circuit Court of Appeals has, on prior occasions, held that it would not set aside a jury verdict if there was a scintilla evidence in the record. *Fleming* v. *American Export Isbrandtsen Lines, Inc., supra.* The only difference between that appeal and the present one is that in that the appellant was a corporate shipowner, whereas here the appellant was a seaman. In this case, the Circuit Court, after reviewing the evidence which related to contributory negligence, determined that there should have been more evidence produced relating to the plaintiff's own negligence. It thereby contradicted its own previous rulings that the presence of some evidence on the point was sufficient to sustain a jury's verdict.

3. Finally, there is the danger that the Circuit Court of Appeals can adopt the practice of remanding cases for retrial until a verdict more acceptable to it is obtained. In effect, the Circuit Courts will become the substitute trier of the facts in civil cases, which it is not permitted to do under the Seventh Amendment. *Atlantic and Gulf Stevedore, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 7 L.Ed. 2d 798, 82 S.Ct. 780.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Dated: New York, New York, May 7, 1973.

Respectfully submitted,

ROBERT A. LILLY
Counsel for the Petitioner
17 Battery Place
New York, New York 10004

ROBERT A. LILLY
and
STEVEN L. BARKAN
On the Petition

APPENDIX

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 346—September Term, 1972.

(Argued January 17, 1973 Decided February 15, 1973.)

Docket No. 72-1202

WILLIAM RIVERA,

Appellant,

v.

FARRELL LINES, INC.,

Appellee.

Before:

FRIENDLY, *Chief Judge,*
OAKES and TIMBERS, *Circuit Judges.*

Appeal from denial of a post-trial motion for a new trial in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* contending there was insufficient evidence of contributory negligence to create a jury issue.

Reversed and remanded for a new trial on all issues.

CHARLES SOVEL, New York, New York (Abraham E. Freedman, on the brief), *for Appellant.*

ROBERT A. LILLY, New York, New York (Lilly, Sullivan & Purcell and Steven L. Barkan, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from an order of the district court denying appellant's post-trial motion for a new trial on the issue of damages or, in the alternative, on all issues. We agree that it was error for the district court to deny the motion and we reverse and remand for a new trial on all issues.

Appellant was employed as a mess man on the S.S. *African Sun*, an American flag merchant ship owned and operated by appellee. His duties included serving meals to the vessel's crew. This work often took him to the crew pantry, which was located on the main deck between the crew mess hall and the ship's main galley and in which desserts and other items needed during the course of a meal were stored.

From at least one previous voyage on the *African Sun* appellant was aware of an ever present difficulty working in the crew pantry. An inch or so of soapy water would back up from the floor drains, making the floor wet and slippery. The back-up resulted from water draining from the officers' pantry directly overhead and then filling the drains in the pantry below. The condition had often been reported to the ship's officers but had gone uncorrected.

During the evening meal of September 9, 1969, one of the crew members asked for ice cream for dessert, and appellant went to the pantry to fetch it. As he returned to the mess hall he slipped and fell on the wet pantry floor. The fall resulted in injury to his back.

Appellant brought suit under the Jones Act, 46 U.S.C. § 688, to recover for his injury. The defense was that appellant was injured as a result of his own contributory negligence, principally consisting of his continued work in the pantry despite his being well aware of the dangerous condition of the floor. To appellant's counsel this defense, although named contributory negligence, sounded suspiciously like the defense of assumption of risk, long elim-

inated from maritime injury law by statute.[1] At the conclusion of the evidence he therefore moved to strike the defense but his motion was denied.

The court then submitted the case to the jury which returned a general verdict and answered four special interrogatories. The interrogatories revealed that the jury found that an unseaworthy condition existed in the ship's pantry; that appellee was negligent on the day of the accident; that the unseaworthiness and negligence played a part in bringing about appellant's injury; and, most important for present purposes, that appellant was contributorily negligent. Under the applicable comparative negligence doctrine, *see* 35 Stat. 66 (1908), 45 U.S.C. § 53(1946), incorporated by reference in 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1946), the finding of contributory negligence went to reduce appellant's recovery. Since no specific finding was made as to the total amount of damages that would have been awarded appellant absent any contributory negligence on his part, it is impossible to know how much appellant's general verdict of $15,000 was affected by the finding.

Following the verdict, appellant moved for a new trial on the ground that there was no evidence of contributory negligence and the issue was thus improperly submitted to the jury. This appeal followed the denial of that motion.

The distinction between assumption of risk and contributory negligence is well established. In common law days the knowledgeable acceptance by an employee of a dan-

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[1] 35 Stat. 66 (1908), 45 U.S.C. § 54 (1946) (railroad employees), *as amended* 53 Stat. 1404 (1939), 45 U.S.C. § 5 (1946), made applicable to seamen by 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1946); *cf. Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939); *Carter* v. *Schooner Pilgrim, Inc.*, 238 F.2d 702, 705 (1st Cir. 1956). In *The Arizona* v. *Anelich*, 298 U.S. 110, 122 (1936), the Court pointed out that assumption of risk had not been a defense in maritime law even prior to the Jones Act. *See* G. Gilmore & C. Black, The Law of Admiralty 299 (1957).

gerous condition when and if such acceptance was necessary for the performance of his duties was assumption of risk. 2 F. Harper & F. James, The Law of Torts § 21.4 (1956). Contributory negligence, on the other hand, connotes some careless act or omission on the part of the employee over and above that knowledgeable acceptance. *Mumma* v. *Reading Co.*, 247 F. Supp. 252, 256-57 (E.D. Pa. 1965).[2] As the defense of assumption of risk has been abolished by statute—indeed, "every vestige" of the doctrine "obliterated," *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 58 (1943)—the first issue before us is whether the charge permitted assumption of risk to go to the jury in the guise of contributory negligence.

The only theory of contributory negligence the record reveals that was both argued by appellee's counsel in summation[3] and charged to the jury by the court[4] was the argument that appellant was careless in moving in and about the pantry, knowing the sloppy condition of the floors. This theory, however, was really assumption of risk masquerading under another name, because it allowed a finding of contributory negligence on the strength of appellant's knowledge that a dangerous condition in his line of duty existed and his working in that line of duty. Evi-

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[2] Although *Mumma* arose under the Federal Employers Liability Act, the provisions of the FELA abolishing defenses formerly available to employers are applicable to seamen by virtue of the Jones Act. *See generally* G. Gilmore & C. Black, *supra* note 1, at 296-98. Thus, *Mumma's* distinction between contributory negligence and assumption of risk is applicable to this case.

[3] "If he *knew* the conditions which he claimed two inches of water, an inch and a half of water on the deck, *did he take extra care?*" (Emphasis supplied.)

[4] The court charged that if the jury accepted the appellee's contentions the appellant "was guilty of carelessness in persisting in moving in and out of this pantry without more caution as to where he walked and how he walked and how he handled himself."

dence of an act of negligence other than appellant's knowledge of the dangerous condition in the pantry was not, though it should have been, required by the court's charge in this case. *Dubose* v. *Matson Navigation Co.*, 403 F.2d 875, 878 (9th Cir. 1968); *Smith* v. *United States*, 336 F.2d 165, 168 (4th Cir. 1964); *Mumma* v. *Reading Co., supra.* *See also* Restatement (Second) of Torts § 496A, comments *d* and *e* at 562-65 (1965). Thus the verdict must be set aside since the finding of contributory negligence may well have been based on this error in the charge.

The court also charged the jury that appellant might have been contributorily negligent by not having "the common sense to go and say to somebody in charge, 'Look, this has got to be cleaned up; I won't work there until it is done.'" There have been holdings that failure to warn a superior officer of a dangerous condition can constitute contributory negligence on the part of a seaman and diminish his recovery for injuries suffered. *Mroz* v. *Dravo Corp.*, 429 F.2d 1156, 1164 (3rd Cir. 1970); *DuBose* v. *Matson Navigation Co., supra*, 403 F.2d at 879. But those cases involved conditions which almost imperceptibly and over a long period of time led to an illness suffered by a single seaman. The danger they presented was not immediately obvious to superiors. *See Mroz* v. *Dravo Corp., supra*, 429 F.2d at 1164 (gas and smoke gradually leading to breathing defects); *DuBose* v. *Matson Navigation Co., supra*, 403 F.2d at 876-77 (light bumps on leg from kitchen workers leading to a cyst). Here, the danger from the wet and sloppy floor was open and obvious to anyone—including officers—who cared to look. Furthermore, unrebutted evidence presented at trial established that prior to the accident numerous complaints about the situation in the pantry had been made to no avail—though not necessarily by appellant. *See Mumma* v. *Reading Co., supra*, 247 F. Supp. at 254. It cannot be known whether further complaint by appellant would have resulted in correction of the drain defect in time to avoid the accident or might on

the other hand have provoked retributive treatment from his superior officers. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 430 (1939). If this theory of contributory negligence is submitted to the jury on retrial at all, it should be done so only with a caveat that the appellant was not duty bound to perform a futile act.

A third theory of contributory negligence was that appellant should have mopped up the wet pantry floor before crossing it. This theory was, however, neither argued by appellee in summation nor specifically mentioned in the court's charge. There was evidence that appellant or another seaman cleaned up the pantry floor. But there was also unrebutted evidence that even after the pantry floor was mopped the back-up from the defective drain would simply recreate slippery ooze. Appellee, who had the burden of establishing appellant's contributory negligence, made no showing that the floor in fact had not been mopped by appellant on the day of the accident or that the wet, sloppy condition would not quickly reoccur after it was cleaned up. It is our view that there was not enough evidence on this theory of contributory negligence to create a jury question.

The final theory of contributory negligence urged by appellee to support the jury's verdict is that appellant unreasonably went to the pantry to get the requested ice cream when he could have gone around the pantry and to the galley and thereby avoided the accident. To support this, there was evidence that ice cream was stored in the galley as well as the pantry. But this alternate route theory, while relied on by the trial judge in denying appellant's post-trial motion, was not argued by the appellee in summation nor specifically charged to the jury. Had appellant been given some notice of this theory, he points out, he would have presented evidence showing that mess men were not allowed to go into the gallery during meals for fear that they would interfere with the work of the cooks and that this is the very reason desserts were stored in the

pantry. He might also have shown how difficult this would have been in connection with the performance of his work under the circumstances. To allow a finding of contributory negligence on the basis of evidence which was at best incomplete and on a theory of which there was no real notice to the appellant could substantially prejudice him. On remand, doubtless the evidence of both sides of this issue will be fully presented.

A question remains, however, whether the new trial should cover all issues or be limited to the issues of contributory negligence and damages. Fed. R. Civ. P. 59(a) permits a remand for a partial new trial. *Cf. Mason* v. *Mathiasen Tanker Industries, Inc.*, 298 F.2d 28, 32-33 (4th Cir.), *cert. denied*, 371 U.S. 828 (1962). Since we are left in the dark as to what the total award would have been absent the finding of contributory negligence and the extent to which that finding affected the verdict, as well as to whether there will be such a finding on a proper charge, we remand for a new trial on all issues. *Caskey* v. *Village of Wayland*, 375 F.2d 1004, 1009-10 (2d Cir. 1967); 3 W. Barron & A. Holtzoff, Federal Practice and Procedure §1307 at 386 (Wright ed. 1958).[5]

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[5] Special interrogatories that—properly explained—would eliminate some of the confusion for a reviewing court or the trial court determining post-trial motions might include:

1. Do you find that plaintiff has established his claim that the defendant was negligent and that its negligence was a proximate cause of plaintiff's accident? (Answer yes or no.) .....

2. Do you find that plaintiff has established his claim that the ship African Sun was in an unseaworthy condition and this unseaworthiness was a proximate cause of plaintiff's accident? (Answer yes or no.) .....

3. If the answer to either Question 1 or 2 above is "yes," what is the *total* amount of damages to plaintiff? Answer in dollars and cents. $.....

Reversed and remanded for a new trial on all issues.

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4. If the answer to both Questions 1 and 2 is "no," your verdict is for the defendant, and you should put an "X" here, and you need not answer any further questions. .....

5. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that negligence was a proximate cause of the accident. (Answer yes or no.) .....

6. If the answer to Question 5 is "yes," what percentage did plaintiff's fault so contribute? ..... (If the answer to Question 5 is "no," do not answer this question. If you entered a percentage on this question, fill in its equivalent dollar amount here: $.....)

7. Subtract the dollar amount stated in Question 6 from the total amount of damages stated in Question 3 and enter here the difference, which will be the net amount of damages you find plaintiff is entitled to recover.

Question 3 total $.....
—Question 6 amount $.....
Net Recovery $.....

Decision of United States District Judge, Harold R. Tyler.

Re: William Rivera v. Farrell Lines, Inc.,
70 Civ. 1340 HRT

This Jones Act suit for damages was tried to a jury on November 17, 18 and 19, 1971. At the conclusion of the trial, plaintiff was awarded a verdict of $15,000.00 Plaintiff thereafter timely moved for a new trial on essentially two grounds. First, plaintiff contends that a letter from the foreman of the jury indicates that there was improper conduct by the jury during deliberations. Second, plaintiff maintains that this court erred by instructing the jury on the issue of contributory negligence, a findng of which was ruled by the jury in response to a special question posed by the court.

At an earlier hearing on the record, this court rejected the first branch of the motion for the reasons indicated at that time.

There remains for consideration the second branch of plaintiff's motion. After having consulted my trial notes and reviewed those portions of the testimony which were available on transcript, I conclude that it was not an error to submit the question of contributory negligence to the jury. Both plaintiff and his witness, Mr. Texidor, admitted that when they went to work at about 1600 hours on the afternoon of the accident, there was water present on the floor of the pantry. It was not until about 1720 hours that plaintiff testified that he slipped and fell in the pantry. In the interim, he made no effort to report the condition or mop it up. More important, the record fairly indicates that plaintiff could have gone to the galley to pick up the order of ice cream rather than proceed into the pantry which, according to him, he knew to be in a dangerous condition. On this record, the jury was entitled to find contributory negligence.

Motion denied in all respects. It is so ordered.

Dated: January 11, 1972.

H. R. Tyler, Jr.
U.S.D.J.

Judgment of the United States District Court.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

70 Civil 1340 (HRT)
JUDGMENT #72,153

WILLIAM RIVERA,

Plaintiff,

—against—

FARRELL LINES INC.,

Defendant.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Harold R. Tyler, Jr., United States District Judge and a jury of six (6) persons, by stipulation, on November 17, 18 and 19, 1971, and the Court having submitted the attached questions to the jury, and the jury having answered the said questions as indicated thereon, and the jury having returned a verdict in favor of the plaintiff, and the jury having further found that the plaintiff contributed to the negligence, and the Court thereafter on January 11, 1972, having handed down its memorandum endorsed denying all motions, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff, WILLIAM RIVERA, have judgment against the defendant, FARRELL LINES INC., in the amount of $15,000.

Dated: New York, N. Y., January 13, 1972.

JOHN R. LIVINSTON
Clerk

APPROVED:

H. R. TYLER, JR.
U.S.D.J.

(AN EXTRACT OF THE MINUTES)

RESPONDENT'S BRIEF

(53807)

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Petitioner,

against

WILLIAM RIVERA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ABRAHAM E. FREEDMAN
CHARLES SOVEL
36 Seventh Avenue
New York, New York 10011
Counsel for Respondent

TABLE OF CONTENTS

	PAGE
Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Counter Statement of the Case	5
Reasons Why a Writ Should be Denied—I. The decision below involves only a proper application of the well established distinction between contributory negligence and assumption of risk, and is supported by numerous decisions of the Supreme Court, including *Schlemmer* vs. *Buffalo, R.&P. R. Co.*, 205 U.S. 1 (1907), *Gila Valley, G.&N. R. Co.* vs. *Hall*, 232 U.S. 94 (1914), *Seaboard A.L.R. Co.* vs. *Horton*, 233 U.S. 492 (1914), *The Arizona* vs. *Anelich*, 298 U.S. 110 (1936), *Tiller* vs. *Atlantic Coastline Railroad Company*, 318 U.S. 54 (1943), and by numerous decisions of the lower federal courts	9
Conclusion	12

Cases Cited

Arizona, The, v. Anelich, 298 U.S. 110 (1936)	9
Carter v. Schooner Pilgrim, Inc. 238 F.2d 702 (1st Cir. 1957)	10
Gila Valley, G.&N. R. Co. v. Hall, 232 U.S. 94 (1914)	9, 11

PAGE

Mumma v. Redding Company, 247 F. Supp. 252 (E. D. Pa. 1965) 10, 11

Schlemmer v. Buffalo, R.&D. R. Co. 205 U.S.1 (1907) 9, 11

Seaboard A.L.R. Co v. Horton, 233 U.S. 492 (1914).. 9, 11

Socony-Vaccum Oil Co. v. Smith, 305 U.S. 424 (1939) 10

Tiller v. Atlantic Coastline Railroad Company, 318 U.S. 54 (1943) 9

Statutes Cited

Federal Employers' Liability Act:

Section 3, 45 U.S.C. § 53 ..... 3, 10n

Section 4, 45 U.S.C. § 54 .....4, 10, 10n

Jones Act, 46 U.S.C. § 688 .....2, 3, 5, 6, 9, 10n

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, William Rivera, respectfully prays that Petitioner's application for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 15, 1973, be denied.

Opinions of the Courts Below

The opinion of the District Court for the Southern District of New York is not yet reported, but is set forth in the Petition, page 15. The opinion of the Court of Appeals also is not yet reported, but is set forth in the Petition, pages 7-14.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition at page 2.

Questions Presented

1. Where, in an action by a merchant seaman under the general maritime law as modified by the Jones Act, 46 U.S.C. § 688, the evidence showed that the seaman was injured in the course of his employment aboard a vessel; that this injury occurred in the vessel's crew pantry; that the seaman fell while working in the crew pantry as a result of the slippery condition of the deck caused by water backing up from drains in the deck; that the condition of the backing up of the drains had been one of long standing, and frequently had been reported to the vessel's officers, without any corrective action being taken by them; and there being no evidence that the seaman could have performed his required duties without going into the crew pantry; was it not error for the trial court to permit a finding of contributory negligence based solely on the seaman having gone into the crew pantry when he had no alternative but to work there, and was not the Court of Appeals correct in reversing such finding on the basis that the repeal of the defense of assumption of risk precluded a finding of contributory negligence under the circumstances presented?

2. Where the defense of contributory negligence was improperly submitted to the jury, and where, post trial, petitioner argued new theories of contributory negligence which had not been raised at trial and of which respondent had no notice, was not the Court of Appeals correct in ordering a new trial?

Statutes Involved

The Jones Act, 46 U.S.C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Federal Employers' Liability Act,

Section 3, 45 U.S.C. § 53:

> "In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4, 45 U.S.C. § 54:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Counter Statement of the Case

The instant action is a suit by an American merchant seaman under the general maritime law as modified by the Jones Act, 46 U.S.C. § 688, to recover damages for personal injuries suffered in the course of his employment aboard ship.

Respondent, William Rivera, had been employed as a crew messman aboard the S.S. AFRICAN SUN, an American flag merchant vessel owned and operated by petitioner, Farrell Lines Inc. As a messman, his duties were to serve meals to the vessel's crew. These duties were performed in the crew messhall and the crew pantry (6a).* In the course of performing his duties in the crew pantry, respondent slipped and fell, severely injuring his back. He subsequently underwent surgery for removal of a herniated disc but was left with substantial disability which ultimately resulted in his being declared permanently not fit for duty.

The cause of respondent's fall was the slippery condition of the deck in the crew pantry resulting from water backing up from a drain located in the deck (12a). This condition had been of longstanding aboard the vessel and frequently had been reported to the vessel's officers. However, no corrective action had been taken (62a).

Respondent sued on theories of unseaworthiness and negligence. In the course of the trial petitioner contended that respondent had been contributorily negligent in continuing to work in the crew pantry when he knew of the slippery condition of the deck in that area (19a). Respondent countered that his continuing to work in this area did not constitute contributory negligence but rather fell under the doctrine of assumption of risk which was not a

* All page references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Second Circuit unless otherwise indicated.

defense under the Jones Act or the general maritime law (64a-65a). Since petitioner presented no other evidence or theory of contributory negligence during the trial, at the conclusion of the evidence counsel for respondent moved to strike the defense of contributory negligence on the specific ground that what petitioner was claiming to be contributory negligence was, in reality, assumption of risk (64a-65a).

The trial judge denied this motion (65a) and submitted the case to the jury under a charge which permitted the jury to find contributory negligence and to reduce any verdict it might award to respondent in accordance with the comparative negligence doctrine. The jury returned a general verdict for respondent in the amount of $15,000, and answered four interrogatories, one of which indicated that they had, indeed, made a finding of contributory negligence.[1] There was no finding as to respondent's total damages absent contributory negligence, nor was there any finding as to the percentage amount of contributory negligence. As a result, it was impossible to determine the extent to which the finding of contributory negligence affected the amount of the verdict, although it clearly must have had a substantial affect as otherwise the award of $15,000 for permanent disability to a 36 year old man would have been grossly inadequate.

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[1] The four interrogatories, each of which were answered "yes" by the jury, were:

(1) Was there an unseaworthy condition in the crew pantry on the date of the alleged accident?

(2) Was the defendant-shipowner negligent on the day of the accident?

(3) If your answer to 1 or 2 above, or both, is "yes" did such unseaworthy condition and/or negligence play a part in bringing about the injury of which plaintiff here complains?

(4) Was plaintiff guilty of contributory negligence at the time in question?

Following the jury's verdict, respondent filed a post-trial motion for a new trial, again contending that the defense of contributory negligence had been improperly submitted to the jury. The trial judge denied this motion (3a-4a). In so doing he stated that he was relying on his trial notes (3a), which were not available to counsel, and that these trial notes indicated that there had been evidence that respondent could have performed his duties without going into the crew pantry, and, therefore, the jury could have based a finding of contributory negligence on respondent's decision to go into the crew pantry when he could have performed his duties without doing so (4a). Counsel for respondent disagreed with the trial judge's statement that there had been evidence that respondent could have performed his duties without going into the crew pantry. Accordingly, in connection with the appeal, the entire transcript of the trial testimony was obtained. Review of the entire transcript disclosed that the trial judge had been mistaken in his recollection of the testimony as there was no evidence that respondent could have performed his duties without going into the crew pantry.[2]

With the benefit of the full transcript before it, and the proven absence of any testimony that respondent need not have gone into the crew pantry to perform his duties, the Court of Appeals for the Second Circuit reversed, holding that the trial judge had erred in permitting the jury to make a finding of contributory negligence on evidence

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[2] Counsel for petitioner has contended that there had been testimony by the vessel's Chief Steward, Mr. Overton, that respondent could have obtained ice cream from a refrigerator located in the crew galley and did not have to go to the refrigerator located in the crew pantry. However, the transcript of Mr. Overton's testimony disclosed that there had been no such testimony by him and that there was no other evidence that respondent could have performed his duties without going into the crew pantry where, admittedly, the deck frequently was slippery because of the backing up of the drains.

which in reality related only to assumption of risk (Petition, pages 10-11). The Court of Appeals also reviewed the evidence in light of other theories of contributory negligence which petitioner argued on appeal, even though these theories had not been argued at trial. The Court found that the evidence simply did not sustain any finding of contributory negligence as distinguished from assumption of risk. Accordingly, a new trial was directed on all issues (Petition, pages 13-14).

Reasons Why a Writ Should be Denied

I. The decision below involves only a proper application of the well established distinction between contributory negligence and assumption of risk, and is supported by numerous decisions of the Supreme Court, including *Schlemmer* vs. *Buffalo, R.&P. R. Co.*, 205 U.S. 1 (1907), *Gila Valley, G.&N. R. Co.* vs. *Hall*, 232 U.S. 94 (1914), *Seaboard A.L.R. Co.* vs. *Horton*, 233 U.S. 492 (1914), *The Arizona* vs. *Anelich*, 298 U.S. 110 (1936), *Tiller* vs. *Atlantic Coastline Railroad Company*, 318 U.S. 54 (1943), and by numerous decisions of the lower federal courts.

In ordering a new trial, the Court of Appeals merely found that the trial court had failed to apply the well established distinction between contributory negligence and assumption of risk when it permitted the jury to make a finding that respondent was contributorily negligent in continuing to work in a dangerous area, when, in fact, there was no evidence that respondent had any alternative other than to work there (Petition, pages 10-11). In actuality, there was no dispute between the parties as to the applicable legal principles; rather, the trial judge simply had made a mistake in believing that there had been evidence that respondent had available to him an alternative means of performing his work when, in fact, there was no such evidence. The full trial transcript revealed this mistake and, accordingly, the Court of Appeals properly directed a new trial so that the case could be submitted to the jury under proper instructions of law. Under no circumstances could this possibly be considered as a case where the petitioner has been denied a right to a jury trial. On the contrary, the Court of Appeals merely was performing its proper supervisory function on appeal of reviewing the evidence as shown by the trial transcript and correcting a mistake made by the trial judge in his recollection of that evidence and his application of settled principles of law thereto.

At issue was whether there was evidence of contributory negligence as distinguished from assumption of risk. It is well established that both under the general maritime law and the Jones Act, 46 U.S.C. § 688, assumption of risk is not a defense, *e.g., Carter* vs. *Schooner Pilgrim, Inc.,* 238 F.2d 702 (1st Cir. 1957), 45 U.S.C. § 54. Indeed, "every vestige" of the defense of assumption of risk has been "obliterated", *Tiller* vs. *Atlantic Coastline Railroad Company,* 318 U.S. 54, 58 (1943).[3] In addition, the doctrine of comparative rather than contributory negligence prevails, *e.g., Socony-Vaccum Oil Co.* vs. *Smith,* 305 U.S. 424 (1939).

While both assumption of risk and contributory negligence relate to conduct of a plaintiff, the distinction between the two concepts is well established. The risks which are not assumed by a seaman are those which arise out of the shipowner's negligence or the unseaworthiness of the vessel. Since the shipowner is under a non-delegable duty to use reasonable care and to provide a seaworthy vessel, a claim that a seaman was contributorily negligent cannot be predicated on the argument that the seaman should not have worked in an unsafe area, unless the circumstances were such that the seaman had a reasonable choice to do otherwise, *e.g., Socony-Vacuum Oil Co.* vs. *Smith, supra.* It follows that a finding of contributory negligence can only be predicated on some careless act or omission on the part of the seaman over and above the knowledgeable acceptance of the unsafe working conditions furnished by the employer. *Mumma* vs. *Redding Company,* 247 F. Supp. 252, 256-257 (E.D. Pa. 1965). Thus, the key to the distinction between assumption of risk and contributory negligence lies in whether the seaman had a reasonable alternative course of

[3] Since the Jones Act incorporates into the maritime law the provisions of the Federal Employers' Liability Act, decisions under the FELA are fully applicable to maritime actions.

conduct available ot him, short of quitting work or refusing an order. *Mumma* vs. *Redding Company, supra;* see *Schlemmer* vs. *Buffalo, R&P R. Co.,* 205 U.S. 1 (1907); *Gila Valley, G.N.R. Co.* vs. *Hall,* 232 U.S. 94 (1914); and *Seaboard A.L.R. Co.* vs. *Horton,* 233 U.S. 492 (1914).

At trial the only argument advanced by counsel for petitioner to support the claim that respondent was contributorily negligent was that respondent had been careless in continuing to work in the crew pantry when he knew of the slippery condition of the deck. However, as the Court below correctly found, this argument really was assumption of risk masquerading under another name (Petition, page 10) because it allowed a finding of contributory negligence solely on the strength of respondent's continuing to work in the crew pantry when he had knowledge that a dangerous condition existed there. Since the charge of the trial court had permitted a finding of contributory negligence based on this argument, error had been committed which could be corrected only by the granting of a new trial (Petition, page 11). To not have ordered a new trial under these circumstances would be to allow assumption of risk to creep back into the maritime law as contributory negligence.

In opposing respondent's post-trial motion and the appeal, petitioner argued other theories of contributory negligence in an effort to sustain the verdict. The Court of Appeals considered these theories and found that the evidence did not support them. Moreover, as the Court of Appeals recognized, none of these theories had been argued to the jury, and, under the circumstances, it would be a denial of justice to permit a finding of contributory negligence on a theory which was not argued at trial and of which counsel for respondent had no notice and no opportunity to rebut.

Petitioner's claim that the Court below did not find that there was "a complete absence" of evidence of contributory negligence and that it had violated the rule that a jury verdict would not be set aside if there was a "scintilla" of evidence to support simply is not correct. The Court below found only that the defense of contributory negligence had been improperly submitted to the jury in that the claimed evidence of contributory negligence was, in reality, assumption of risk, and that the theories of contributory negligence which petitioner argued *after* the trial in an effort to sustain a jury verdict which had been initially obtained on an improper theory of contributory negligence were not supported by the evidence. This case presents no unusual or unique principle of law which warrants review by this Court. Rather, it involves only a proper exercise of judicial review by a Court of Appeals in reversing a trial court's erroneous application of settled law to a particular set of facts.

Conclusion

For the above foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

Abraham E. Freedman
Charles Sovel
36 Seventh Avenue
New York, New York 10011
Counsel for Respondent

CERTIORARI DENIED